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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs,

v.

CONNECTU, INC. (formerly known as CONNECTU, LLC), PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, and DAVID GUCWA,

Defendants.

Case No. 5:07-CV-01389-RS

PLAINTIFFS' RESPONSE TO FINNEGAN'S MOTION TO WITHDRAW AS COUNSEL FOR WINSTON WILLIAMS

Date: January 23, 2008
Time: 9:30 A.M.
Judge: Honorable Richard Seeborg

Dockets.Justia.com

I. INTRODUCTION

Plaintiffs do not, as a general proposition, oppose Finnegan, Henderson, Farabow, Garrett & Dunner's Motion to Withdraw as Counsel for Defendant Winston Williams, if the withdrawal is subject to conditions limiting prejudice to Plaintiffs. If conditions are not imposed, Plaintiffs oppose the request.

Courts will condition withdrawal of counsel in order to reduce prejudice to the opposing party. Here, conditions are particularly appropriate. In light of Finnegan's inability to communicate with Williams, he likely is unaware of the present motion. As such, he may attempt to re-establish communication with Finnegan – the firm he believes to be representing him. Under the circumstances, and in order to avoid prejudice to Plaintiffs, any withdrawal must be subject to 1) Finnegan's acceptance of service of papers in this matter pursuant to Local Rule 11-5, 2) Finnegan's filing of an affidavit detailing any further attempts to contact Williams and a list of addresses at which Williams has been known to live or otherwise occupy, 3) Finnegan's notification to the Court and Plaintiffs immediately upon contact with Williams, 4) the other Defendants' compliance with discovery obligations, 5) an adverse inference being drawn against Defendants' if they use Williams' unavailability as a basis to avoid responding to discovery, 6) Defendants' agreement not to seek further delays in this case based on Williams' disappearance, and 7) Defendants' agreement not to seek to avoid liability by claiming only Williams is responsible.

Absent these conditions, the Court and Plaintiffs will be unfairly prejudiced. Defendants will continue to use Williams as an excuse to refuse to provide substantive responses to discovery and will likely seek to delay this matter pending Williams' inevitable return. Further, Plaintiffs will be prejudiced by the delay these issues will bring to their ability to resolve a case that has been pending for over two years.

II. BACKGROUND

In May 2007, the Court authorized expedited jurisdictional discovery related to a Motion to Dismiss filed by Winston Williams and Pacific Northwest Software ("PNS"). Doc. No. 74. As part of that discovery, Plaintiffs served four interrogatories on each defendant related to their contacts with California. Decl. of Theresa Sutton in Supp. of Resp. to Mot. to Withdraw ("Sutton Decl."), Ex. A. Plaintiffs took limited depositions of each defendant for approximately four hours each. Dissatisfied with PNS' and Williams' responses to the interrogatories, on October 17, 2007, Plaintiffs moved to compel further responses to Interrogatory Nos. 3 and 4. Doc. No. 212.

On November 7, 2007, Plaintiffs served a set of interrogatories on all Defendants. Sutton Decl., Ex. B. This set of interrogatories seeks identification of the user accounts and passwords used by the defendants to access the Facebook website, as well as the number of emails sent to invite Facebook users to join ConnectU. On December 5, 2007, a month after Williams purportedly disappeared, Finnegan requested a 30-day extension of time for all defendants to respond to this set of interrogatories. *Id.*, Ex. C. Finnegan's request did not explain that it was not able to communicate with Williams, nor did Finnegan cite the failure of communication as a basis for the extension. Plaintiffs offered to condition the month-long extension on Defendants' promise to provide full and complete responses. *Id.*, Ex. D. Finnegan did not respond to this offer. Instead, on December 10, 2007, 35 days after Williams' alleged disappearance, Finnegan served on behalf of all Defendants, *including Williams*, responses to this set of interrogatories.[1] *Id.*, Ex. E. Williams' responses make no reference to his unavailability, but instead indicate that the interrogatories cannot be answered because they purportedly did not understand the definitions in the requests. *Id.*

On November 21, 2007, Plaintiffs served a set of Requests for Production of Documents on each of Williams and PNS. *Id.*, Ex. F. Their responses were due on December 24, 2007. Finnegan did not, on Williams' behalf, seek an extension to respond to these requests, despite Finnegan's apparent concerns about its inability to communicate with Williams. Instead, Williams served a response on December 26, 2007, in which he refuses to produce any responsive documents – not because he is not available, but largely because to do so would be "expensive." *Id.*, Ex. G.

[1] Each defendant served a separate response to these interrogatories. Nothing about Williams' responses differs from the other defendants' responses. Williams' responses make no mention of his unavailability and, in fact, offers to meet and confer regarding his responses. *See*, *e.g.,* Sutton Decl., Ex. E, 5:1-3.

On December 12, 2007, two days after Williams served responses to interrogatories, the Court issued an Order Granting Plaintiffs' Motion to Compel Supplemental Responses to Interrogatories ("Order"). Doc. No. 234. Two days later, Finnegan notified Plaintiffs for the first time of its inability to communicate with Williams. Sutton Decl., Ex. H.

Numerous discovery disputes currently exist. The parties met and conferred on December 24, 2007, in an effort to resolve Defendants' objections to Plaintiffs' November 7 Interrogatories. The parties were unable to resolve all of the deficiencies in Defendants' responses. At no time during the discussion about Defendants' responses did counsel for Williams indicate that he would not be able to provide further responses for Williams.

III. ARGUMENT

A. If Finnegan's Withdrawal Can Be Accomplished Without Further Prejudice to Plaintiffs, They Do Not Oppose The Motion

While Plaintiffs have serious questions about Williams' current discovery responses by his current counsel, Plaintiffs are not generally opposed to Finnegan's request to withdraw as counsel for Williams, so long as the withdrawal is conditioned so as not to further prejudice Plaintiffs' ability to move this case forward. *California v. M & P Invs.*, No. CIV. 00-2441 FCD/JFM, 2007 U.S. Dist. LEXIS 81131, *13 (E.D. Cal. Oct. 22, 2007) ("Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit.").

To avoid any prejudice, withdrawal must be conditioned on Finnegan's agreement to accept service of papers in this matter unless or until Williams appears by other counsel, as required by the Local Rules. Civ. L. R. 11-5(b); *see also Britesmile, Inc. v. Discus Dental, Inc.*, No. C02-03220 JSW, 2005 U.S. Dist. LEXIS 30871, *1 (N.D. Cal. Nov. 15, 2005); *El Hage v. United States Sec. Assocs.*, No. C06-7828 TEH, 2007 U.S. Dist. LEXIS 93633 (N.D. Cal. Dec. 10, 2007) (where court imposed conditions on withdrawal, the failure of which to comply would result in denial of the motion). Because Finnegan has been unable to communicate with Williams, he presumably is unaware of the present motion. Williams' lack of knowledge and inability to assent to the withdrawal, however, should not result in prejudice to Plaintiffs' ability to serve all parties when necessary. Civ. L. R. 11-5(b) (notice required "reasonably in advance");

Rule 3-700(A)(2) of the Rules of Prof'l Conduct of the State Bar of California (notice required).

Finnegan also must be required to provide Williams' contact information to Plaintiffs. *See, e.g., California v. M & P Invs*., 2007 U.S. Dist. LEXIS 81131, *12 (where local rule required that the attorney to "provide an affidavit stating the current or last known address or addresses of the client"). And, should Finnegan learn of Williams' location at any time while this matter is pending, it must bring his whereabouts to the Court's and Plaintiff's attention immediately.

Finnegan's withdrawal also must be conditioned on Defendants' diligent compliance with their discovery obligations. Withdrawal by counsel should not enable Defendants, who are represented by Finnegan, to claim Williams is the only person capable of providing discovery responses and, therefore, they cannot respond adequately. *See, e.g.,* Sutton Decl., Ex. I (PNS' response to Interrogatory Nos. 3 and 4). Based on the evidence collected to date, at least defendants Chang, Gucwa and PNS were as involved in the development of the software used to breach Facebook's security, steal data and spam users as Williams was. *Id.*, Exs. J, K. Defendants also must not seek any further delays in this matter on the ground that Williams is incommunicado.

Similarly, Defendants should not be permitted to avoid liability by claiming Williams is at fault for all of the alleged wrongdoing. The evidence collected to date shows that all of the defendants were involved, some as much as Williams. *Id*.

These conditions place no significant burden on Finnegan and do not change Defendants' obligations. Yet, a withdrawal subject to these conditions, will provide Plaintiffs assurance that Williams' disappearance and Finnegan's withdrawal will not prejudice Plaintiffs' ability to move this case along and get it resolved on the merits.

B. Finnegan's Analysis Under the Guiding Principles for Addressing Motions To Withdraw Is Incomplete

As noted in Finnegan's moving papers, some Northern District of California Courts have used the following guidelines to determine whether to grant or deny a motion to withdraw:

> (1) the reasons why withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case.

Irwin v. Mascott, No. C97-4737 JL, 2004 U.S. Dist. LEXIS 28264, *4 (N.D. Cal. Dec. 1, 2004). While Plaintiffs believe that analysis of the present facts in light of these guidelines dictates against withdrawal, if the withdrawal is subject to the conditions as described above to eliminate the potential for prejudice, the motion may be granted. *California v. M & P Invs.*, 2007 U.S. Dist. LEXIS 81131.

1. Litigants May be Prejudiced if Finnegan is Permitted to Withdraw

Finnegan incorrectly argues that none of the parties will be prejudiced if it is permitted to withdraw from representing Williams. Plaintiffs will be prejudiced. Plaintiffs will have no means for contacting Williams, serving him as required by the Rules or ensuring the Court maintains effective jurisdiction over him. Furthermore, history has shown that the other defendants will seek to escape their discovery obligations by pointing to Williams as the source of all relevant information. Sutton Decl., Exs. I, L-N. Finnegan currently is the only known direct link to Williams. Even if Williams has not communicated over the last month or so, there is no reason to believe he will not reappear and reach out to Finnegan – the firm Williams knows to be representing him. Further, if Williams does contact Finnegan after it is permitted to withdraw, it will have no obligation to inform the Court or the parties that the firm is in contact with him.

Plaintiffs also will be prejudiced if ConnectU's and PNS' prior assertions about Williams' involvement in the acts giving rise to this action are accepted as true. Both ConnectU and PNS have repeatedly argued that Williams developed the Importer and Social Butterfly programs and that he, alone, has knowledge of the facts. *Id.* Plaintiffs believe substantial evidence exists to call that assertion into question.

In addition, Williams himself will be prejudiced by Finnegan's withdrawal. He presumably is unaware that such a request has been made and, given his financial status as repeatedly argued by Finnegan, he likely will be unable to engage substitute counsel. If Finnegan withdraws without condition, Williams will not be served with documents in this matter, will not be advised of his rights and responsibilities, will not be notified of any settlement efforts, and will run the risk of defaulting.

Finnegan argues that Plaintiffs have received all relevant documents that Williams had in his possession. Mot. to Withdraw, 6:8-9. In fact, Mr. Williams has produced no documents. In addition, Williams testified in his deposition that his laptop was stolen earlier this year.[2] Notably, in its motion, Finnegan admits that Williams reviewed "files and documents he had in his possession." *Id.*, 2:13-15. To the extent Finnegan has taken possession or control of these "files and documents," they must be produced. Finnegan and Williams should not be permitted to use the proposed withdrawal to prevent Plaintiffs from obtaining relevant discovery.

Finnegan also erroneously contends that Williams' four hour deposition related to jurisdiction elicited all testimony Plaintiffs believe was necessary for this case. *Id.*, 6:9-11. That deposition was authorized by the Court as part of expedited discovery related to the then-pending motion to dismiss. Doc. No. 74. The subject matter was limited, and all of the questions asked were related to a single issue – jurisdiction. Plaintiffs are prepared to notice a general deposition of Williams on all issues related to this case as soon as possible.

2. Finnegan's Withdrawal May Interfere with This Court's Administration of Justice

Finnegan incorrectly argues that this "case has little to do with Williams." Indeed, ConnectU and PNS repeatedly asserted that Williams developed the Importer and Social Butterfly programs used to breach Facebook security and steal user data. Sutton Decl., Exs. L-1, 87:1-3, 106:10-15, 109:19-22; L-2, 86:1-16; M-1, 98:17-22, M-2, 61:25-62:4, ; *see also* Ex. K ("WW took over the [Social Butterfly] project completely"). These facts are important to the case. Notably, ConnectU and PNS repeatedly assert that Williams is the only person capable of providing substantive discovery responses. *Id.*, Exs. J (at 3 and 4); M-2, 89:2-25; M-1, 90:1, 116:9-16, 137:4-18, 204:6-20; N; *see also* Doc. No. 220, fn6.

In addition, the Court's ability to maintain any meaningful jurisdiction over Williams will be limited if he is not represented by counsel. Other courts have held that the

> Court must balance the interests of Defendants, whose whereabouts are unknown and who have shown little respect for the Court's orders in the past, their attorneys, who are understandably reluctant

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[2] His failure to produce documents is particularly troublesome because Williams was served in December 2006, with a subpoena for documents. One of the currently outstanding document requests seeks all documents collected and preserved in response to that subpoena. Sutton Decl., Ex. F at Request No. 26.

> to continue to represent them, and Plaintiffs, who cannot obtain even basic discovery … .

Irwin, 2004 U.S. Dist. LEXIS 28264, *9. If the Court permits Finnegan to withdraw, Williams "will effectively elude this Court's jurisdiction and escape the consequences of violating both federal law and the orders of this Court." *Id.* at *10-11. The *Irwin* court found such a result to be a "grave injustice to Plaintiffs and a mockery of the jurisdiction of this Court." *Id.* at *11.

3. Finnegan's Withdrawal Could Delay This Case

As noted above, if Finnegan is permitted to withdraw, Plaintiffs run the risk that discovery will be stalled. Indeed, responses to the interrogatories that are subject to the Order have been outstanding since June 2007. If Finnegan withdraws, discovery will only be delayed further. As noted above, Finnegan admits in its motion that Williams has "files and documents … in his possession." Mot. to Withdraw, 2:13-15. Finnegan's withdrawal may mean that those files and documents are never produced to Plaintiffs. Further, PNS is now likely to respond to the Order requiring its and Williams' collaboration in providing meaningful interrogatory responses by indicating that it cannot possibly provide further information without Williams. If Williams is represented, Finnegan continues to have a duty to this Court and his clients to ensure compliance with the Order. If Finnegan withdraws, it will be permitted to wash its hands of this issue.

C. Plaintiffs Are Not To Blame for Williams' Failure To Provide Adequate Interrogatory Responses

Though irrelevant to the present motion, Finnegan devotes a fair amount of argument to accusing Plaintiffs of "surprising" Williams with information that Defendants should have initially included in their interrogatory responses. The "three (3) new documents" to which Finnegan refers (Mot. to Withdraw, 2:23-27), consist of 1) excerpts from Williams' deposition testimony (a deposition defended by Finnegan), 2) documents produced in this litigation by Defendant Gucwa and served upon Finnegan, and 3) documents produced by Finnegan on PNS' behalf. The "additional document" submitted in a supplemental declaration also was produced by PNS in this litigation. Finnegan does not explain why PNS and Williams should not be responsible for reviewing their own files to provide complete responses to interrogatories. Finnegan's attack is a red herring.

IV. CONCLUSION

If Finnegan, Henderson, Farabow, Garrett & Dunner's withdrawal can be condition so as not to impose prejudice on Plaintiffs, Plaintiffs are not opposed to the request. Absent the above-described conditions, Plaintiffs will suffer prejudice by the proposed withdrawal and, thus, would oppose the motion to eliminate such prejudice.

Dated: January 2, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Theresa A. Sutton /s/

Theresa A. Sutton
Attorneys for Plaintiffs
THE FACEBOOK, INC. and MARK ZUCKERBERG

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 2, 2008.

Dated: January 2, 2008

Respectfully submitted,

/s/ Name Here /s/

Name of Attorney